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In the
United States Court of Appeals
for the Seventh Circuit

No. 99-2618

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY
and CHRISTIE WHITMAN,*

Defendants-Appellees,

and

SOKAOGON CHIPPEWA COMMUNITY,

Intervening Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 96-C-90–**Charles N. Clevert**, *Judge*

ARGUED NOVEMBER 6, 2000–
DECIDED SEPTEMBER 21, 2001

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* Pursuant to Fed. R. App. P. 43(c), Christie Whitman is substituted as a party for Carol M. Browner.

Before KANNE, DIANE P. WOOD, and WILLIAMS, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*. Although the general model of sovereignty suggests that different sovereign states normally occupy different geographic territories, see, *e.g.*, Restatement (3d) of the Foreign Relations Law of the United States, § 201 (1986), the existence of federations and confederations shows that overlapping sovereignty is also a common feature of modern political organization. In this case, we confront one of the more complex kinds of overlapping sovereignty that exists in the United States today: that between the States and Indian tribes. The Supreme Court addressed one aspect of that relationship in its 2000 Term in *Nevada v. Hicks*, 121 S. Ct. 2304 (2001), which held that tribal authorities lacked legislative jurisdiction to regulate the activities of state officials on reservation land when those officials were investigating off-reservation violations of state law. *Id.* at 2318. A different aspect of the same relationship is before us here: namely, whether the Environmental Protection Agency (EPA), acting through authority delegated to it by statute, was empowered to treat a particular tribe as a "state" for purposes of certain water quality rules. Like the district court, we conclude that the EPA acted properly in doing so, and we thus affirm the district court's judgment rejecting the challenge Wisconsin has brought to the EPA's action.

I

A. The Clean Water Act

The Clean Water Act (the Act) prohibits the discharge of pollutants into navigable waters unless the discharge is sanctioned by a permit or statute. See 33 U.S.C. § 1311(a). Permits are issued by the EPA or by state agencies subject to EPA review. *Id.* at § 1342. The Act also gives states the authority to establish water quality standards for waters

within their boundaries (*id.* at § 1313), to certify compliance with those standards (*id.* at § 1341), and to issue and enforce discharge permits (*id.* at §§ 1342, 1319), all under the watchful eye of the EPA. Like other states, Wisconsin has enacted its own federally approved comprehensive water pollution regulatory system. See Wis. Adm. Code chapters 33, 280, 281, NR 100-91, and NR 102-106.

In 1987, Congress amended the Act to authorize the EPA to treat Indian tribes as states under § 518 of the Act. Once a tribe has treatment-as-state (TAS) status, the statute permits it to establish water quality standards for bodies of water within its reservation and to require permits for any action that may create a discharge into those waters. 33 U.S.C. § 1377(e). In 1991, after full notice-and-comment rule-making, the EPA issued a final rule implementing this provision and setting forth the requirements Indian tribes would have to meet in order to be granted TAS status:

> (1) the tribe must be federally recognized;
>
> (2) the tribe must have a governing body carrying out substantial governmental duties and powers;
>
> (3) the functions to be exercised by the tribe must pertain to the management and protection of water resources which are held by the tribe, held by the United States in trust for the tribe, or otherwise within the borders of the reservation; and
>
> (4) the tribe must be capable of carrying out the functions of the Act.

40 C.F.R. 131.8(a); see also 33 U.S.C. §§ 1377(e)(1)-(3).

Relying heavily on the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), the EPA concluded that this was neither a plenary delegation of

inherent authority to tribes to regulate all reservation waters, nor was it a standard that precluded tribal regulation of any non-member or any off-reservation activity. See 56 Fed. Reg. at 64877. Instead, the agency chose a case-by-case approach under which a tribe attempting to satisfy element (3) of the regulation would have to show that it possesses inherent authority over the waters in light of evolving case law. See 56 Fed. Reg. at 64878. There was no question that tribes could regulate the activities of tribal members, undertaken on the reservation, in order to protect the quality of reservation waters. In addition, the EPA concluded that "a tribe may regulate the activities of non-Indians on fee lands within its reservations when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

The EPA acknowledged that this will usually be an easy showing, based on "generalized findings" that water quality is related to human health and welfare. See *id.* Although the EPA stated that it would make a case-specific determination with regard to the scope of each tribe's authority, once a tribe has shown that impairment of the waters on the reservation would have a serious and substantial effect on the health and welfare of the tribe, the EPA presumes that there has been an adequate showing of inherent authority. *Id.* at 64879.

B. The Mole Lake Band and its Application For TAS Status

The waters at issue in this case are lakes and streams adjacent to or surrounded by the reservation of the Sokaogon Chippewa Community, also known as the Mole Lake Band of Lake Superior Chippewa Indians (the Band), located in northeastern Wisconsin. The Mole Lake reservation is unusual in two respects. First, the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. In

particular, Rice Lake, the largest body of water on the reservation, is a prime source of wild rice, which serves as a significant dietary and economic resource for the Band. Second, all of the 1,850 acres within the reservation are held in trust by the United States for the tribe. None of the land within the reservation is controlled or owned in fee by non-members of the tribe.

In August 1994, the Band applied for TAS status under the Act. Wisconsin opposed the application, arguing that it was sovereign over all of the navigable waters in the state, including those on the reservation, and that its sovereignty precluded any tribal regulation. Nevertheless, after elaborate administrative proceedings, on September 29, 1995, the EPA approved the Band's application, finding that the tribe had satisfied all of the requirements of 40 C.F.R. § 131.8, including the necessary demonstration of its inherent authority over all water resources on the reservation. In keeping with its earlier positions, the EPA noted that the inherent authority question did not turn on who had title to the land underneath the waters.

This grant of TAS status alarmed the State of Wisconsin, which saw it as both an affront to the state's sovereignty and, more pragmatically, as an action with the potential to throw a wrench into the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake. Concerned about its loss of authority over certain territory within its outer boundaries and worried that the tribal water standards might limit the activities of the mine by prohibiting some or all of the discharge from the mine, Wisconsin filed this action in district court on January 25, 1996, reiterating its challenge to the EPA's grant of TAS status to the Band. (The United States and the EPA waived immunity under 5 U.S.C. § 702.) The state's case raises a fundamental challenge to the TAS grant; the relief it seeks is outright revocation of the grant, rather than mere accommodation for any particular project.

We are therefore satisfied that the issue is ripe now and need not await the Band's promulgation of specific water quality standards. If Wisconsin is right, it is entitled to have the EPA's creation of a state-like entity within its borders voided–an action that lies within the power of the court. See *Community Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981 (7th Cir. 2000). Similarly, it is one in which a failure to review the issue now would cause hardship to the parties. *Id.*

In April 1999, the district court upheld the TAS grant, finding that the EPA's determination that a tribe could regulate all water within the reservation, regardless of ownership, was a reasonable interpretation of the relevant statutes and regulations. Wisconsin now appeals.

II

We review a grant of summary judgment *de novo*, *Doe v. Howe Military Sch.*, 227 F.3d 981, 990 (7th Cir. 2000), applying the same standards as the district court: we will set aside an agency determination only if it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." See *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001); see also the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (set aside agency decision if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law). We should uphold the agency's determination as long as it considered relevant data under the correct legal standards and offered a satisfactory explanation for its actions. See *Howard Young Med. Ctr., Inc. v. Shalala*, 207 F.3d 437, 441 (7th Cir. 2000). Moreover, the EPA here has interpreted the statute by promulgating formal regulations, using plenary notice-and-comment procedures, and then implementing its rule with respect to the Band through a formal process in which the state was entitled to be heard. Its regulations and subsequent decision are therefore entitled to deference under *Mead*, 121

S. Ct. at 2171, and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1994).

Wisconsin is challenging the EPA's findings only with respect to the third requirement for TAS status–the demonstration of the tribe's inherent authority to regulate water quality within the borders of the reservation. Wisconsin gives three reasons why the EPA's determination that the tribe had established such authority was unreasonable.

1. Not "Within the Borders"

For the first time on appeal, Wisconsin contends that Rice Lake is not "within the borders" of the reservation because the legal description of the reservation runs only to the Lake's highwater mark. This argument is waived, however, because Wisconsin did not present it to the EPA. See *Vermont Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54 (1978). Furthermore, even if we could overlook this waiver and considered the argument on its merits, we would reject it. As the map attached to the Stipulated Joint Appendix illustrates, Rice Lake is almost completely surrounded by reservation land (and the small percentage that is not abuts off-reservation trust lands). If the EPA had been given a chance to consider this point, it would have been completely reasonable for it to interpret the phrase "within the borders" to include such a body of water.

2. No Authority Because No Title

Second, Wisconsin argues that the tribe does not have authority over the water resources on the reservation because the state has ownership of the underlying lake beds. We will assume for the purposes of this appeal that, pursuant to the Equal Footing Doctrine, the state does indeed have title to the lake beds within the reservation. See *Idaho v. Coeur d'Alene*

Tribe of Idaho, 521 U.S. 261, 283-88 (1997); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-96 (1987).

This court has indeed held that, in some situations, state ownership of lake beds may restrict a tribe's authority to regulate the waters running over those beds. In *Wisconsin v. Baker*, 698 F.2d 1323, 1335 (7th Cir. 1983), we found that, because the state of Wisconsin held title to the underlying lake beds in a reservation, the Chippewa Band was precluded from restricting hunting and fishing in the reservation waters.

But contrary to Wisconsin's assertions, *Baker* does not dispose of this case. Most importantly, *Baker* did not involve a particular statute under which Congress specified that tribes would be entitled to be treated as states under particular circumstances, and both Congress and the responsible agency outlined the regulatory authority tribes were to exercise. The legal structure governing *Baker* involved only the treaty that created the reservation, and that treaty did not contain any language regarding the tribe's power to regulate reservation waters. The Clean Water Act, by contrast, explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights. Secondly, the *Baker* court explicitly states that the "defendants do not contend that public fishing and hunting pose an imminent threat to the 'political integrity, the economic security, or the health or welfare' of the Band." *Id.* at 1335. Thus, the *Baker* court left open the possibility that state ownership of lake beds may not preclude tribal authority over the waters if tribal regulation was necessary to protect the "political integrity, the economic security, or the health or welfare" of the Band, as both parties concede is the case here. Thirdly, *Baker* was about hunting and fishing rights, which have traditionally been the subject of state regulation, while the ultimate authority for the water quality standards lies with the federal EPA, not the state of Wisconsin (which itself has acted only pursuant to federal delegation).

Baker therefore has little or no application to the case before us. We find pertinent instead a number of legal principles all of which support the EPA's determination that a state's title to a lake bed does not in itself exempt the waters from all outside regulation. First, "the power of Congress to regulate commerce among the states involves the control of the navigable waters of the United States." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). This power has not been eroded in any way by the Equal Footing Doctrine cases, which "involved only the shores of and lands beneath navigable waters. [The doctrine] cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause." *Arizona v. California*, 373 U.S. 546, 597-98 (1963). Unlike the situation in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), here no one disputes that the waters at issue are "navigable waters" for purposes of either the Clean Water Act or the Commerce Clause.

The breadth of federal authority over Indian affairs is equally well-established: "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters."); U.S. Const., Art. I, § 8, cl.3. In fact, in the absence of tribal TAS status, the EPA and not the state of Wisconsin might well be the proper authority to administer Clean Water Act programs for the reservation, because state laws may usually be applied to Indians on their reservations only if Congress so expressly provides. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

Because the state does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now

complain about the federal government allowing tribes to do so. It was reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water, and we uphold that determination.

3. No Inherent Authority over Off-Reservation Activities

Finally, Wisconsin argues that the Band did not make the required showing of authority over those activities potentially affected by its imposition of water quality standards. Because the EPA has determined that, unlike the Clean Air Act, the Clean Water Act is not an express delegation of power to tribes, see 56 Fed. Reg. at 64880, the EPA requires tribes to show that they already possessed inherent authority over the activities undoubtedly affected by the water regulations. EPA regulations allow a tribe to establish this authority by showing that impairment of the reservation's waters would affect "the political integrity, the economic security, or the health or welfare of the tribe." 56 Fed. Reg. at 64877.

This regulatory language tracks the Supreme Court's decision in *Montana v. United States, supra*, in which the Court recognized the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S. at 565, but went on to hold that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. See also *Atkinson Trading Co., Inc. v. Shirley*, 121 S. Ct. 1825 (2001). The regulations also track the more recent Supreme Court language in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), by noting that authority is usually proper because "water quality management serves the purpose of

protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." 56 Fed. Reg. at 64879. (We note too that this case does not involve any question of the tribe's ability to restrict activities of state law enforcement authorities on the reservation, when those officials are investigating off-reservation crimes, and thus the rule of *Hicks*, 121 S. Ct. 2304, is not implicated.)

Once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state (*e.g.*, zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on-reservation waters (assuming for the sake of argument that the reservation standards are more stringent than those the state is imposing on the upstream entity). See *Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). Such compliance may impose higher compliance costs on the upstream company, or in the extreme case it might have the effect of prohibiting the discharge or the activities altogether. This is a classic extraterritorial effect, which Wisconsin argues is impermissible and takes this case beyond the scope of *Montana*, which concerned only tribal authority over non-member activities on reservation fee lands.

But this is not the only situation where upstream and downstream users may have different standards and some accommodation is necessary. Wisconsin's argument could be made equally if the downstream regulator were Illinois, yet in that case the need for the two states to coordinate their standards, or for the upstream company to comply with the more stringent rules, would be clear. In fact, Congress anticipated this very problem in the statute, and it had the following to say about it:

> The Administrator shall, in promulgating such regulations [for TAS status], consult affected States

> sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

33 U.S.C. § 1377(e).

The EPA has developed the mechanism called for by the statute, which allows it to mediate conflicting interests when a tribe's standards differ from those of a state. See also 33 U.S.C. § 1341(a). In addition, once a tribe is given TAS status, the Act gives it the same right as that given to states to object to permits issued for upstream off-reservation activities. See 56 Fed. Reg. at 64887. In deciding whether to issue a permit for discharge within a state that may violate the water quality standards of a downstream tribe, the EPA may ask the parties to engage in mediation or arbitration, in which the decision-maker and the EPA administrator, who has the final authority over the issuance of the permit, will consider such factors as "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards." 33 U.S.C. § 1377(e). The EPA may then ask the tribe to issue a temporary variance from its standards for the particular discharge or may ask the state to provide additional water pollution controls. See 54 Fed. Reg. at 39099-101; 56 Fed. Reg. at 64885-89; 40 C.F.R. §§ 121.11 through 121.16. This

mechanism, rather than a futile effort to avoid extraterritorial effects, is the way both Congress and the agency sought to accommodate the inevitable differences that would arise.

We say "inevitable" because activities located outside the regulating entity (here the reservation), and the resulting discharges to which those activities can lead, can and often will have "serious and substantial" effects on the health and welfare of the downstream state or reservation. There is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation, and it would be exceedingly hard to say that the EPA's interpretation is contrary to law in the face of the express recognition of this issue and the choice of a solution in the statute itself. It was reasonable for the EPA to determine that, since the Supreme Court has held that a tribe has inherent authority over activities having a serious effect on the health of the tribe, this authority is not defeated even if it exerts some regulatory force on off-reservation activities.

Finally, we think Wisconsin exaggerates the power of the tribe to veto upstream discharge activities. The tribe cannot impose any water quality standards or take any action that goes beyond the federal statute or the EPA's power. To the contrary, the EPA supervises all standards and permits. Far from allowing a tribe to veto a state permit, granting TAS status to tribes simply allows the tribes some say regarding those standards and permits. It is quite possible that, in particular cases, perhaps through the vehicle of the statutory mediation mechanism, the EPA may require the tribe's more stringent standards to give way to upstream discharge and development. Whether the tribe or the state ultimately "wins" in the dispute, it is the EPA, not the tribe or the state, that has the ultimate authority to decide whether or not to issue a permit.

Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for

the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities. Since a state has the power to require upstream states to comply with its water quality standards, to interpret the statutes to deny that power to tribes because of some kind of formal view of authority or sovereignty would treat tribes as second-class citizens. Nothing in § 1377(e) indicates that Congress authorized any such hierarchy. Particularly in light of the deference we owe to the EPA's decisions here, we see nothing that would justify our setting aside the agency's action.

III

We conclude that the EPA's grant of TAS status to the Band is not arbitrary, unreasonable, or contrary to law and we therefore AFFIRM the district court's judgment. We note once again in closing that the EPA's decision in each case seeking TAS status is fact-specific. In this case, both parties conceded that the waters within the Band's reservation are very important to the Band's economic and physical existence. Additionally, the reservation here is unusual in that there are no parcels of fee land within the reservation owned by non-members of the tribe. We have no occasion to say whether, on a different set of facts, the EPA might extend the notion of a tribe's "inherent authority" to affect off-reservation activities so far as to go beyond the standards of the statute or the regulations. If it ever arises, that will be another case, for another day.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 96-C-90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CAROL BROWNER,

Defendants,

and

SOKAOGON CHIPPEWA COMMUNITY,

Intervening Defendant.

ORDER GRANTING EPA'S MOTION FOR SUMMARY JUDGMENT (DOC. #49); GRANTING SOKAOGON CHIPPEWA COMMUNITY'S MOTION FOR SUMMARY JUDGMENT (DOC. #59); DENYING STATE OF WISCONSIN'S MOTION FOR SUMMARY JUDGMENT (DOC. #65) AND DISMISSING CASE

Before the court is the Environmental Protection Agency's (EPA) Motion for Summary Judgment (Doc. #49); the Sokaogon Chippewa Community's Motion for Summary Judgment (Doc. #59); and the State of Wisconsin's Motion for Summary Judgment (Doc. #65). For the reasons set forth herein, summary judgment will be granted to the EPA and

Sokaogon Chippewa Community (Sokaogon). The State of Wisconsin's summary judgment motion will be denied.

I. BACKGROUND

This case involves a challenge to the EPA's grant of "treatment as state" (TAS) status to the Sokaogon Chippewa Community pursuant to § 1377(e) of the Clean Water Act. That section authorizes the EPA to treat Indian tribes as states in promulgating water quality standards. Wisconsin contends that the EPA exceeded its authority by granting the Sokaogon Chippewa Community TAS status; the EPA and Sokaogon Tribe request an order upholding the EPA's decision.

A. The Clean Water Act

The Clean Water Act (CWA) prohibits discharges from a point source of any pollutant into waters unless the emission discharge complies with the Act's requirements. See 33 U.S.C. § 1311(a). For most discharges, such compliance is achieved by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System (NPDES) permit. See 33 U.S.C. § 1342. NPDES permits are issued by EPA or, in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program, by a state agency subject to EPA review. See 33 U.S.C. § 1342(b).

Under the NPDES program, each state must adopt water quality standards (WQS) for its waters, subject to review and approval by EPA. See 33 U.S.C. § 1313(a)-(c). Once WQS have been adopted, EPA will issue an NPDES permit provided the relevant state certifies that any discharges under the proposed permit will be consistent with its WQS. See 33 U.S.C. § 1341(a).

In 1987, Congress added § 1377(e) to the CWA thereby authorizing EPA to permit tribes "to be treated as a state" for purposes of promulgating WQS. Section 1377(e) states:

> The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II . . . to the degree necessary to carry out the objectives to this section, but only if –
>
> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Section 1377(h) defines Federal Indian reservation as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . .."

After notice and an opportunity to comment, EPA issued a rule in 1991 enumerating the standards for processing tribal requests for TAS status. See 56 Fed. Reg. 64,876 (1991). The Rule requires:

1. The tribe must be federally recognized and exercising governmental authority;

2. The tribe must have a governing body carrying out "substantial governmental duties and powers";

3. The water quality standards program which the tribe seeks to administer must "pertain to the management and protection of water resources," which are "within the borders of an Indian reservation;"

4. The Indian tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and regulations.

See 40 C.F.R. § 131.8(a).

B. The Sokaogon Chippewa Community

The Sokaogon Chippewa Community is a Native American tribe previously known in the past as the Sokaogon Band, the Mole Lake Band, the Post Lake Band, the Rice Lake Band, the Pelican Lake Band, the Lake Bands and the Lost Band. Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 685 (E.D. Wi. 1992). The Sokaogon Chippewa are descendants of the Lake Superior

Chippewa tribes that roamed the Northern Wisconsin area before white settlement in the early to mid-1800's. Id.

For reasons not relevant here, the Sokaogon Chippewa were a nomadic tribe and did not receive their own reservation land until the 1930's. In 1934, the Indian Reorganization Act authorized the Secretary of the Interior to purchase new lands and turn them into Indian reservations. 25 U.S.C. §§ 465, 467. Thereafter, the Sokaogon received 1,437 acres in Forest County, Wisconsin, in 1939, and additional land in that area in 1982. This area is designated as the Mole Lake Reservation. Sokaogon Chippewa Community, 805 F. Supp at 690. Unlike many reservations today, the reservation lands are owned wholly by the United States in trust for the Sokaogon Tribe. There are no non-Indian lands owned in fee by non-members of the Tribe. See Montana v. United States, 450 U.S. 544 (1981).

On August 13, 1994, the Sokaogon Tribe filed an application for treatment as a state under § 1377 of the Clean Water Act.

C. The State of Wisconsin's objection

The State of Wisconsin objected to the Sokaogon Tribe's TAS application arguing that it enjoys sovereignty over all navigable waters located within state boundaries by virtue of the Public Trust and Equal Footing Doctrines. Before Wisconsin became a state, the United States held these interests in trust for the public pursuant to a 1783 deed of cession by four of the original 13 states and the Northwest Ordinance of 1787. Wisconsin received these interests upon admission to the Union pursuant to the Wisconsin Enabling Act of 1846, 9 Stat. 56, and the Act of March 3, 1847, 9 Stat. 178. Because the Mole Lake Reservation was not created until roughly 91 years later, the State contends the Tribe never acquired ownership of navigable water beds and cannot regulate within those beds under § 1377(e)(2).

The State relies heavily on State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). In that case, it sought a declaratory judgment that fishing and hunting restrictions set by the Chippewa Indians on their reservation infringed the general public's right to use navigable state waters. Wisconsin asserted property interests in those waters as trustee for the public. The Seventh Circuit concluded that the 1854 treaty which created the Chippewa reservation did not explicitly divest the state of its interest in navigable waters, and there was no public exigency at the time the treaty was signed warranting such an inference. Id. at 1334-35. Thus, the court concluded that the State retained exclusive sovereignty over waters within the reservation. Id. at 1335.

The State also relied on Montana v. United States, 450 U.S. 544 (1981). In Montana, the Supreme Court stated:

> The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River. The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union.
>
> Though the owners of land riparian to nonnavigable streams may own the adjacent riverbed, conveyance by the United States of land riparian to a navigable river carries no interest in the riverbed. Rather, the ownership of land under navigable waters is an incident

> of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce . . ..
>
> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Id. at 550-52 (citations omitted).

Based on the foregoing, the State asserts that the Sokaogon Tribe may not set water quality standards within the boundaries of its reservation because it does not hold title to those waters. Furthermore, the State challenges EPA's conclusion that the Sokaogon Tribe is capable of implementing a water quality standards program.

Alternatively, the State contends that the EPA's decision violates the establishment clause by reposing regulatory authority in entities that intend to base decision making, at least in part, on religious and spiritual principles.

Standard of Review

On September 29, 1995, the EPA approved the Tribe's application for TAS status, concluding that the Tribe had satisfied all requirements of C.F.R. § 131.8, including demonstrating its authority over all water resources on the reservation. That decision is at issue here.

The Administrative Procedure Act commands reviewing courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."[1] 5 U.S.C. §

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[1] Title 5 U.S.C. § 706(2) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

706(2)(A). In Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984), the Supreme Court established a two-step approach to judicial review of agency interpretations of acts of Congress. First, the reviewing court must determine whether there is a clear and unambiguous congressional intent concerning the precise question at issue. If congressional intent is clear and unambiguous, then that intent must be given effect. A reviewing court proceeds to the second step "if the statute is silent or ambiguous with respect to the specific issue." Id. at 842-843. Then, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id.

This court must also give substantial deference to an agency's interpretation of its own regulations. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-151 (1991). This court's task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). In other words, the court must defer to the secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at

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(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

It is uncontested that the present controversy is not controlled by §§ 706(2)(E) or 706(2)(F), which primarily apply in cases involving either agency rulemaking or adjudication. Nor is there a claim that the EPA exceeded its constitutional authority under § 706(2)(B) or its statutory authority under § 706(2)(C).

the time of the regulation's promulgation." Gardebring v. Jenkins, 485 U.S. 415, 430 (1988).

II. CONCLUSIONS OF LAW

A. The EPA's grant of TAS status to the Sokaogon Tribe was not arbitrary, capricious, an abuse of discretion or contrary to law.

The court concludes that the EPA's grant of TAS status to the Sokaogon Tribe must be upheld. After careful review of the administrative record in this case, the court cannot conclude that the EPA's decision was "arbitrary, capricious, an abuse of discretion or contrary to law."

As an initial matter, the court concludes that the administrative record supports the EPA's conclusion that the Sokaogon Tribe is federally recognized and exercising governmental authority. Under the Wheeler-Howard Act of June 1934, the Sokaogon Chippewa Community became a federally recognized tribe with a governing body operated under a Constitution and by-laws. The Charter of Incorporation to the Sokaogon Chippewa Community was ratified and became effective on October 7, 1939.

The administrative record also supports the EPA's conclusion that the Sokaogon Tribe has a governing body carrying out "substantial governmental duties and powers". The Band's government includes a Tribal Council, which carries out executive and legislative functions, pursuant to a Constitution and by-laws.

The EPA's conclusion that the Sokaogon Tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean

Water Act and regulations is also amply supported by the record. The EPA concluded:

> [T]he Band is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act by the existence of management and technical skills, by the existence of institutions to exercise executive, legislative and judicial functions, by a history of successful managerial performance of public health and environmental programs, and by acceptable accounting and procurement procedures.
>
> The Mole Lake Band demonstrates the requisite management and technical skills and history of successful management and technical skills and history of successful management performance through its existing environmental programs. The Band has maintained a multi-media environmental office for 4 years, with the addition of staff expertise in the areas of water quality, data management and planning. The Band has received numerous grants under the Clean Water Act, Resource Conservation and Recovery Act, the Clean Air Act and the Indian General Assistance Program. At the present time, the Tribal environmental department is performing reservation-wide monitoring of its surface waters, air quality and ground water. In addition, the Band has been working on the development of a water quality standards program for several years with financial and technical assistance from the Region. The band has submitted several

> well-written drafts of the water quality standards regulations to the Region for review and comment and held a formal public hearing to gather comments on its water quality standards . . ..

The State argues that the EPA erred in concluding that the Sokaogon Tribe satisfied the capability requirement because the tribe failed to demonstrate that it will provide adequate judicial review of certification decisions. The court disagrees. The EPA expressly concluded that "the Band is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act by the existence of . . . institutions to exercise . . . judicial functions . . .." The administrative record supports this finding and the decision is entitled to deference.

Furthermore, the administrative record supports the EPA's conclusion that the water quality standards program which the Tribe seeks to administer pertains to the management and protection of water resources within the borders of an Indian reservation. See 40 C.F.R. § 131.8(a)(1). Although it is unclear what Congress intended when it enacted § 1377(e)(2), EPA's construction of this section is reasonable and permissible.

Section 1377(e) permits a Tribe to be treated as a state for purposes of the Clean Water Act if:

> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on

> alienation, or otherwise within the borders of an Indian reservation . . ..

33 U.S.C. § 1377(e)(2) (emphasis added).

When reading § 1377(e)(2) it is uncertain whether Congress intended Indian Tribes to have some kind of ownership interest in the water resources to be regulated, or whether Congress intended that Tribes regulate all water within their reservations, regardless of ownership. Nevertheless, the EPA's construction of this section is reasonable and permissible. In promulgating the regulation construing this section, the EPA concluded that a tribe must show that the "water quality standards program which the tribe seeks to administer must 'pertain to the management and protection of water resources,' which are 'within the borders of an Indian reservation.'" See 40 C.F.R. § 131.8(a)(1). Although the EPA recognized that tribes generally possess the authority to regulate activities affecting water quality on their reservation, it acknowledged that the Clean Water Act does not grant additional authority to tribes. See 56 Fed. Reg. at 64,880.

Moreover, the EPA's regulations indicate that applications by Tribes will be supplemented by its two general findings regarding the effects of water pollution on reservations. First, the EPA found that the CWA contains an implicit congressional finding that impacts to water quality constitute potential serious and substantial effects on human health and welfare. 56 Fed. Reg. at 64,878. Furthermore, the EPA also determined that activities on fee lands within a reservation will likely impact the quality of waters on the tribal portions of the reservation.[2] 56 Fed. Reg. at 64,878.

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[2] The EPA stated:

> [B]ecause of the mobile nature of pollutants in surface waters and the relatively small length/size of stream

The EPA also expressed its intent to rely on Montana v. United States, 450 U.S. 544 (1981), and its progeny in examining TAS applications. See 56 Fed. Reg. at 64, 880. In Montana, the Supreme Court concluded that absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation. Montana, 450 U.S. at 564. In certain circumstances, however, even where Congress has not expressly authorized it, Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on fee lands. Id. at 566. The first exception to the general rule relates to non-members who enter consensual relationships with the tribe or its members. The second concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." See also Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989).

Notwithstanding the absence of non-member fee lands on the Mole Lake Reservation, the EPA relied on Montana's second exception in concluding that the Sokaogon Tribe possessed inherent regulatory authority over the water within its reservation.

> segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality.

56 Fed. Reg. at 64,878.

The reservation today consists of approximately 1850 acres, all of which are in trust status. The reservation land is very water rich, with many acres and miles of surface water and wetland habitat. The Band is very much reliant upon these resources, which sustain their lives and their culture physically, and are integral to the Band's cultural identity. The resources provide the Band with a reliable source of food, fresh water, medicines and raw materials, while at the same time nurturing culturally important practices such as traditional hunting, fishing and gathering. Therefore, the Band's intention to protect and regulate water quality within the reservation is consistent with the desire to safeguard these resources.

The largest area of surface water on the reservation, Rice Lake, covers 320 acres with an additional 320 acres of adjacent wetland habitat . . . Rice Lake is wholly contained within the reservation boundaries and is prime habitat for the largest single strand of inland emergent wild rice in the world. Wild rice serves as the foundation for the Band's diet, as it has for centuries. The Rice Lake rice is also critical to the Band's economy, with a portion of it sold to other Tribes and inter-Tribal organizations as seed. Although the relationship between wild rice and water quality is only beginning to be fully understood, it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes, i.e., degradation. The Band's water quality

> standards provide a mechanism for protecting this important resource.
>
> Swamp Creek, which flows through the reservation, contains a diverse assemblage of both cold and warm water species. At its confluence with Rice Lake, it is considered a high quality cold water habitat; as it leaves Rice Lake it is designated as a high quality warm water habitat. Swamp Creek feeds Rice Lake, accounting for nearly 35 percent of the total volume of water in the lake.
>
> In addition, other surface water resources within and/or partially within the reservation include: Gliske Creek, a cold water trout stream supporting naturally viable brook and brown trout; Logan Creek and Amuck Creek, both cold water streams; and, Bishop Lake, a warm water habitat. There are also large wetland complexes adjacent to each of these resources, as well as isolated wetlands.

The EPA further concluded that the Sokaogon Tribe has the authority to regulate the water resources within the reservation:

> EPA need not answer the complicated and fact-specific question of whether the State retains title to the beds of navigable waters within the Mole Lake Reservation. The answer to this question depends upon a detailed analysis of Congressional intent at the time of creation of the Mole Lake Reservation. The State's citation to the decision in Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983) . . . is of limited value here, since it deals with a different reservation

. . . and thus different historical circumstances. Nonetheless, EPA need not resolve this issue since, even if the State did retain title to the beds of the Mole Lake Reservation, EPA could, for the reasons expressed below, properly conclude that the Band has adequate civil regulatory authority over the water resources on the Reservation to establish water quality standards under Section 303 of the CWA.

[U]nder Section 518 of the CWA, Congress clearly expressed its intent to permit Tribes to regulate waters located within the exterior boundaries of Indian reservations where they can demonstrate the authority and capability to do so. All lands within the Reservation, including those riparian to the navigable waters for which the Band intends to set standards, are held in trust for the Band by the Federal government. Of course, the Band clearly has regulatory authority over all members of the Band. Since all of the Reservation lands are trust lands, the Band will necessarily possess authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters.

Furthermore, we understand that, as a matter of the common law of Wisconsin, while the State may retain title under the equal footing doctrine to the beds of navigable lakes, title to the beds of navigable rivers, streams, or creeks has subsequently passed to the riparian land owner, subject to any restrictions imposed by the public trust doctrine . . ..

> In light of this pattern of ownership, we believe it is largely irrelevant whether the Band could "control the activities" of non-members who might be present on lakes within the Reservation if the State holds title to the lake beds and grants access thereto. We think the likelihood that such activities have occurred or have had any impact on water quality is remote. The factual situation suggests that the Band can adequately regulate virtually all activities which might affect the quality of Reservation waters . . ..

This conclusion is consistent with § 1377(e)(2) and related EPA regulations. Although the court questions whether Congress intended such a result, both the statute and legislative history are ambiguous and the EPA was charged with administering the CWA. The EPA's construction is reasonable and permissible.

Two points are worthy of note. First, the EPA is entitled to considerable deference in its interpretation of the Clean Water Act because it is charged with administering the Act. See Chevron, 467 U.S. at 844; Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992). In the Clean Water Act, Congress provided the EPA with "substantial statutory discretion." Arkansas, 503 U.S. at 107. Second, it is a deeply rooted principle of the Supreme Court's Indian jurisprudence that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

B. The State of Wisconsin's Establishment Clause Claim is Without Merit.

Alternatively, the State argues that permitting the Sokaogon Tribe to administer the WQS program, given the

prominent role of religion in its regulatory program, violates the establishment clause. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion . . .." U.S. Const. amend. I. Government action does not violate the Establishment Clause if "[t]he challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993).

The State of Wisconsin's Establishment Clause claim is premature. This case is not a challenge to any particular water quality standards. Instead, the State challenges EPA's approval of the Sokaogon Tribe's application for authority to develop such standards. As a result, the State's Establishment Clause claim is rejected.

Now, therefore,

IT IS ORDERED that Environmental Protection Agency's (EPA) Motion for Summary Judgment (Doc. #49) is granted.

IT IS FURTHER ORDERED that the Sokaogon Chippewa Community's Motion for Summary Judgment (Doc. #59) is granted.

IT IS FURTHER ORDERED that the State of Wisconsin's Motion for Summary Judgment (Doc. #65) is denied.

Dated at Milwaukee, Wisconsin, this 28th day of April, 1999.

BY THE COURT

/s/
C. N. CLEVERT
U. S. District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 96-C-90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CAROL BROWNER,

Defendants,

and

SOKAOGON CHIPPEWA COMMUNITY,

Intervening Defendant.

This action came before the court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed.

APPROVED: _____
C.N. CLEVERT
U. S. District Judge

SOFRON B. NEDILSKY
Clerk

4·28·99 /s/
Date *(By) Deputy Clerk*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

Sep 29 1995

REPLY TO THE ATTENTION OF

R-19J

Mr. Arlyn Ackley, Sr.
Tribal Chairman
Mole Lake Band of the
Lake Superior Chippewa
Sokaogon Chippewa Community
Route 1, Box 625
Crandon, Wisconsin 54520

Dear Mr. Ackley:

It is my pleasure to inform you of my decision to approve the application of the Mole Lake Band of the Lake Superior Chippewa, Sokaogon Chippewa Community, to administer the water quality standards program pursuant to the Clean Water Act, Section 303.

The Mole Lake Band has satisfied all of the requirements set forth at the Code of Federal Regulations, Title 40, Part 131.8, "Requirements for Indian Tribes to be treated as States for purposes of water quality standards", including demonstrating its authority over all water resources on the reservation.

The Sokaogon Chippewa Community's water quality standards will be approved under separate cover pending receipt of United States Fish and Wildlife Service concurrence.

I have attached a copy of the memorandum from Robert Perciasepe, Assistant Administrator for the Office of Water, which concurs with my decision.

If you have any questions or would like additional information, please contact Ms. Claudia Johnson-Schultz at (312) 886-6108.

Sincerely yours,

/s/
Valdas V. Adamkus
Regional Administrator

Enclosure

cc: Mr. George Meyer, Secretary, Wisconsin DNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

Aug 28 1995

Office of
Water

MEMORANDUM

SUBJECT: Application for Mole Lake Band of the Lake Superior Tribe of Chippewa Indians for Authority to Administer the Water Quality Standards Program

FROM: Robert Perciasepe /s/
Assistant Administrator

TO: Valdas V. Adamkus
Regional Administrator, Region V

I am pleased to inform you that I have approved the application from the Mole Lake Band, requesting authority to administer the water quality standards program under Section 303 of the CWA, as required under the Agency's Delegation of Authority No. 2-78 and you may so notify the Tribe.

The Mole Lake Band received "treatment as a State" status for Section 106 on June 29, 1992. Therefore, the Tribe need only: (1) describe the agency which will assume primary responsibility to establish, review, implement and revise water quality standards; and (2) describe the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The Mole Lake Band has demonstrated they have the needed staff to administer the

program, and they have authority over water resources on the reservation.

I have attached a copy of the Office of General Counsel's and Office of Enforcement's concurrence memoranda for your records.

Should you have any questions or need further information, you may have your staff contact Dave Sabock of the Water Quality Standards Branch at 260-1315.

Attachments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Application for the Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians for Authority to Administer the Water Quality Standards Program

FROM: Elaine G. Stanley, Director /s/
Office of Compliance

TO: Robert Perciasepe
Assistant Administrator for Water

Our review of the application for the Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians for authority to administer a water quality program under Section 303 of the Clean Water Act indicates that no enforcement issues are raised. In accordance with section 2-78 of the Delegations Manual, dated April 3, 1989, the Office of Enforcement and Compliance Assurance concurs on the application of the Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians to conduct a water quality standards program under Section 303 of the Clean Water Act.

cc: Kenneth A. Fenner, Region V
James J. Havard, OGC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Aug 22 1995

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Application of the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians for Treatment In the Same Manner as a State under Section 303 of the Clean Water Act – REQUEST FOR CONCURRENCE

FROM: Jonathan Z. Cannon /s/
Assistant Administrator (General Counsel)

TO: Robert Perciasepe
Assistant Administrator for Water

Region V has requested the concurrence of the Office of Water in the Region's decision to approve the application of the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians (the Band) for treatment in the same manner as a State under Section 303 of the Clean Water Act (CWA). The concurrence of the Office of General Counsel is also required under the Agency's Delegation of Authority No. 2-78 because it is the first section 303 application from an Indian Tribe in Region V.

Background

Section 518(e)(2) of the CWA specifies that, in order to qualify for treatment in the same manner as a State, a

Tribe must demonstrate that it: (1) is a federally recognized Tribe, (2) has a governing body carrying out substantial governmental duties and powers, (3) has adequate authority over water resources within a reservation, and (4) is reasonably expected to be capable of administering the program the Tribe is seeking to administer. EPA regulations at 40 CFR § 131.8 require a Tribe to submit an application which demonstrates that it meets each of these four criteria. If a Tribe has previously submitted an application for approval under another EPA program, it need only submit any additional information unique to the current program. 40 CFR § 131.8(b)(6).

OGC Review

We reviewed the Band's application and supporting documents, the Regional Administrator's memorandum outlining his proposed eligibility determination, and the analysis of the Region V Office of Regional Counsel (ORC). We note that the Band has already been approved for treatment in the same manner as a State under Section 106 of the CWA.

A. Federal Recognition/Substantial Duties and Powers

In approving the Band's Section 106 application, the Agency previously determined that the Band is federally-recognized and possesses a government exercising substantial duties and powers. We concur in the Region's finding that these requirements continue to be met.

B. Jurisdiction

The Band seeks approval for waters that are within its Reservation. All lands within the Reservation are held in trust for the Band by the Federal government. ORC has found, and the State of Wisconsin has not disputed, that the

Band has authority over the activities of Band members on those trust lands that may impact the quality of Reservation waters. We concur in this finding.

The State, however, questions "the ability of the [B]and to control the activities of others on any public waterways that are held to be within its reservation," in light of the equal footing and public trust doctrines. Letter from George E. Meyer, Secretary, State of Wisconsin Department of Natural Resources to Valdas V. Adamkus, Regional Administrator, EPA Region IV (sic), December 7, 1994. The State argues that it owns the beds of navigable waters within the Reservation pursuant to the equal footing doctrine. In addition, the State asserts that any claim of authority the Band has over waters and waterbeds is subject to the public trust doctrine, which charges the State with the duty of administering and protecting all navigable waters within the State for the good of the public.

The ORC memo of May 19, 1995 concludes, and we agree, that EPA need not answer the complicated and fact-specific question of whether the State retains title to the beds of navigable waters within the Mole Lake Reservation. The answer to this question depends upon a detailed analysis of Congressional intent at the time of creation of the Mole Lake Reservation. The State's citation to the decision in Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983) (finding State sovereignty over navigable waters within an Indian reservation), is of limited value here, since it deals with a different reservation (the Lac Court Oreilles) and thus different historical circumstances. Nonetheless, EPA need not resolve this issue since, even if the State did retain title to the beds of the Mole Lake Reservation, EPA could, for the reasons expressed below, properly conclude that the Band has adequate civil regulatory authority over the water resources on the Reservation to establish water quality standards under Section 303 of the CWA.

As discussed in the ORC memo, under Section 518 of the CWA, Congress clearly expressed its intent to permit Tribes to regulate waters located within the exterior boundaries of Indian reservations where they can demonstrate the authority and capability to do so. All lands within the Reservation, including those riparian to the navigable waters for which the Band intends to set standards, are held in trust for the Band by the Federal government. Of course, the Band clearly has regulatory authority over all members of the Band. Since all of the Reservation lands are trust lands, the Band will necessarily possess authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters.

Furthermore, we understand that, as a matter of the common law of Wisconsin, while the State may retain title under the equal footing doctrine to the beds of navigable lakes, title to the beds of navigable rivers, streams, or creeks has subsequently passed to the riparian land owner, subject to any restrictions imposed by the public trust doctrine. On the Mole Lake Reservation, title to the beds of the streams and creeks, even if once possessed by the State, has now passed to the Band (as beneficial owner of the trust lands). Thus, the Band may also exercise regulatory authority over all activities occurring on the creeks within the Mole Lake Reservation even if once held by the State.

In light of this pattern of ownership, we believe it is largely irrelevant whether the Band could "control the activities" of non-members who might be present on lakes within the Reservation if the State holds title to the lake beds and grants access thereto. We think the likelihood that such activities have occurred or have had any impact on water quality is remote. The factual situation suggests that the Band can adequately regulate virtually all activities which might affect the quality of Reservation waters. We also doubt that, in the case of a reservation such as this one, where <u>all</u> the lands (except perhaps those within the navigable

waters themselves) are Tribal trust lands, a court would even find the need to examine the scope of Tribal authority over non-members' activities (since there are no non-Indian lands owned in fee by non-members, only lands arguably owned by the State).

Nonetheless, even if the scope of the Band's authority over non-members' activities were relevant here, we believe that the Band could easily establish jurisdiction by showing that the effect of the activities of such non-members on the health and welfare of the Band would be "serious and substantial." EPA has already determined that, as a general matter

> because of the mobile nature of pollutants in surface waters and the relatively small size of . . . water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands.

56 Fed. Reg. 64,876, 64,878 col 3. (Dec. 12, 1991). Furthermore, the CWA reflects a Congressional determination that activities which impair water quality have a serious and substantial impact on health and welfare. This generalized finding seems especially appropriate where, as on the Mole Lake Reservation, all or virtually all lands are Tribal or trust lands. In addition, the Mole Lake decision package demonstrates that the Band is very much reliant on the availability of the water resources within the Reservation, as these resources sustain the lives of the Band and are integral to the Band's cultural integrity. In particular, Rice Lake, the largest water body, is a prime source of wild rice

which serves as a significant diet and economic resource for the Band. Memo from Valdas V. Adamkus, Regional Administrator, to Robert Perciasepe, Assistant Administrator for Water, June 2, 1995. Thus, any activities of non-members in the navigable waters of the Reservation which would impair the water quality could be expected to have a serious and substantial effect on the health and welfare of the Band.

For these reasons, we support the conclusion of the ORC that the Band has demonstrated adequate jurisdiction to administer the Section 303 water quality standards program.

C. Capability

Region V has concluded that the Band satisfies the capability requirement. Because this is a factual question best addressed by the EPA office with the greatest experience working with the Band, we defer to the Region's conclusion.

Conclusion

Based on our review, we concur in the Region's determination that the Band may be treated in the same manner as a State for purposes of section 303 of the CWA.

cc: Valdas V. Adamkus
Steven A. Herman

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2001

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 99-2618

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY and CHRISTIE WHITMAN,*,
Defendants-Appellees,

and

SOKAOGON CHIPPEWA COMMUNITY,
Intervening Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 96-C-90

Charles N. Clevert,
Judge

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*Pursuant to Fed. R. App. P. 43(c), Christie Whitman is substituted as a party for Carol M. Browner.

ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed in the above matter by counsel for the plaintiff-appellant, all members of the original panel voted to **DENY** rehearing. No judge in regular active service requested a vote on rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is **DENIED.**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

Jun 2 1995

REPLY TO THE ATTENTION OF

R-19J

MEMORANDUM

SUBJECT: Proposed Water Quality Standards Program of the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community

FROM: Valdas V. Adamkus
Regional Administrator

TO: Robert Perciasepe
Assistant Administrator for Water (4101)

This memorandum is to request your concurrence on my decision to grant the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community (the "Band") "treatment as a State" status for the Clean Water Act's Water Quality Standards program. As set forth below, the Band meets all of the statutory and regulatory criteria for such treatment. To assist you in making your determination, I am attaching a complete package of information for your review.

Background: The Mole Lake Reservation is located in Forest County in northeastern Wisconsin. The reservation today consists of approximately 1850 acres, all of which are in trust status. The reservation land is very water rich, with many

acres and miles of surface water and wetland habitat. The Band is very much reliant upon these resources, which sustain their lives and their culture physically, and are integral to the Band's cultural identity. The resources provide the Band with a reliable source of food, fresh water, medicines and raw materials, while at the same time nurturing culturally important practices such as traditional hunting, fishing and gathering. Therefore, the Band's intention to protect and regulate water quality within the reservation is consistent with the desire to safeguard these resources.

The largest area of surface water on the reservation, Rice Lake, covers 320 acres with an additional 320 acres of adjacent wetland habitat. A map has been attached for your reference [Attachment 1]. Rice Lake is wholly contained within the reservation boundaries, and is prime habitat for the largest single stand of inland emergent wild rice in the world. Wild rice serves as the foundation for the Band's diet, as it has for centuries. The Rice Lake rice is also critical to the Band's economy, with a portion of it sold to other Tribes and inter-Tribal organizations as seed. Although the relationship between wild rice and water quality is only beginning to be fully understood, it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes, i.e., degradation. The Band's water quality standards provide a mechanism for protecting this important resource.

Swamp Creek, which flows through the reservation, contains a diverse assemblage of both cold and warm water species. At its confluence with Rice Lake, it is considered a high quality cold water habitat; as it leaves Rice Lake it is designated as a high quality warm water habitat. Swamp Creek feeds Rice Lake, accounting for nearly 35 percent of the total volume of water in the lake.

In addition, other surface water resources within and/or partially within the reservation include: Gliske Creek, a cold water trout stream supporting naturally viable brook and brown trout; Logan Creek and Amuck Creek, both cold water streams; and, Bishop Lake, a warm water habitat. There are also large wetland complexes adjacent to each of these resources, as well as isolated wetlands.

Statutory and Regulatory Requirements: Section 518(e) of the Clean Water Act sets forth the requirements for a Tribe to be treated as a State for the Water Quality Standards program. Regulations implementing that Section are promulgated at 40 C.F.R. Part 131.8. The Band and the Region have met all substantive and procedural requirements of Part 131.8, as explained below:

> Section 131.8(a)(1) and (2): Federal Recognition; Governmental Functions. These requirements are identical to the Federal recognition and governmental functions requirements for the Clean Water Act Section 106 and 314 programs. Since the Band has already demonstrated that it meets these requirements for the Clean Water Act Section 106 and Section 314 programs [Attachments 2 and 3], it does not have to demonstrate that it meets these requirements for this program. 59 Fed. Reg. 64,340 (December 14, 1994). 40 C.F.R. Part 131.8(b)(6).
>
> Section 131.8(a)(3): Jurisdiction. The Band has demonstrated that the functions to be performed in regulating the water quality of the surface water resources are within its jurisdiction. Specifically, all lands within the reservation are held in trust for the Band by the United States and all of the water resources lie within the reservation boundaries. During its comment period, the State of Wisconsin raised a competing claim of jurisdiction regarding the status of land title to the beds of navigable waters.

After consultation with the Office of General Counsel and the Department of the Interior, the Office of Regional Counsel has determined that the State's argument lacks merit and that the Band has adequate jurisdiction to receive program authorization. [Attachment 4].

Section 131.8(a)(4): Capability. In my judgement, the Band is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act by the existence of management and technical skills, by the existence of institutions to exercise executive, legislative, and judicial functions, by a history of successful managerial performance of public health and environmental programs, and by acceptable accounting and procurement procedures.

The Mole Lake Band demonstrates the requisite management and technical skills and history of successful management performance through its existing environmental programs. The Band has maintained a multi-media environmental office for 4 years, with the addition of staff expertise in the areas of water quality, data management and planning. The Band has received numerous grants under the Clean Water Act, Resource Conservation and Recovery Act, the Clean Air Act and the Indian General Assistance Program. At the present time, the Tribal environmental department is performing reservation-wide monitoring of its surface waters, air quality and ground water. In addition, the Band has been working on the development of a water quality standards program for several years with financial and technical assistance from the Region. The Band has submitted several well-written drafts of the water quality standards regulations to the Region for review

and comment and held a formal public hearing to gather comments on its water quality standards on May 13, 1995.

The Band's government includes a Tribal Council, which carries out executive and legislative functions, and a Tribal Court, which carries out judicial functions.

The Region's oversight of Agency grants administered by the Band confirms the acceptability of the Band's accounting and procurement procedures established in past treatment as a State applications.

Section 131.8(b): Completeness of Application. The August 13, 1994, application submitted by the Band contains all of the elements required by the Agency regulations as simplified by EPA's December 12, 1994, Final Rule on Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 40 C.F.R. Part 131.8(b)(6): a narrative statement describing the capability of the Band to administer an effective water quality standards program, including a description of the existing staff who will assume primary responsibility for establishing, reviewing implementing and revising water quality standards; and a description of the technical and administrative capabilities of that staff. [Attachment 5].

Section 131.8(c): Application Processing. The Region promptly notified the Band of receipt of its application and, within 30 days, also notified the State of Wisconsin. The notification to the State included information on the substance and basis of the Band's assertion of authority to regulate the quality of reservation waters. As set forth in the previously cited opinion of the Office of Regional Counsel, the State of Wisconsin raised a competing

claim of jurisdiction, and the State and Band submitted comments in support of their positions. Based upon these comments and the opinion of the Office of Regional Counsel, I have determined that the Band has adequately demonstrated that it meets the requirements of 40 C.F.R. Part 131.8(a)(3).

In sum, I recommend the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community for "treatment as a State" under the Water Quality Standards program. My staff and I believe that the Band is capable and experienced in environmental program management and implementation and possesses a genuine interest in environmental protection. It is my determination, as Regional Administrator, that the Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community meets all the applicable statutory and regulatory requirements for treatment as a State and is thus eligible to submit a water quality standards package for approval by the Region. I request your formal concurrence on this determination.

If you should have any questions regarding the information submitted, please contact Barry DeGraff, acting Director of the Water Division, at 312/353-2147.

/s/
Valdas V. Adamkus

Attachments

CONCUR: _____ _____
Robert Perciasepe Date
Assistant Administrator for Water

NON
CONCUR: _____ _____
Robert Perciasepe Date
Assistant Administrator for Water

Attachment 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 19 1995

REPLY TO THE ATTENTION OF

CM-29A

MEMORANDUM

SUBJECT: Authority of the Mole Lake Band of the Lake Superior Chippewa Indians, Sokaogon Chippewa Community, to Regulate the Quality of Reservation Waters

FROM: Marc M. Radell
Associate Regional Counsel

THROUGH: Gail C. Ginsberg
Regional Counsel

TO: Valdas V. Adamkus
Regional Administrator

After reviewing the assertion by the Mole Lake Band of the Lake Superior Chippewa Indians, Sokaogon Chippewa Community (the "Band") of the authority to regulate the quality of reservation waters and the competing claim of jurisdiction raised by the State of Wisconsin, the Office of Regional Counsel believes that the Band has the authority it asserts. We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c) (4), you determine that the Band has adequately demonstrated that it meets the jurisdictional requirements of

40 C.F.R. § 131.8(a) (3). In reaching our opinion, ORC consulted with the Office of General Counsel and the Department of Interior's Office of the Solicitor.

On August 13, 1994, the Band submitted an application to the Region for "treatment as a State" for the Clean Water Act Section 303 water quality standards program. On November 4, 1994, the State of Wisconsin raised a competing claim of jurisdiction on the application and requested an additional 90 days to supplement its comments [Attachment 1]. On November 18, 1994, you provided the Band with a copy of the State's competing claim and provided both parties until December 5, 1994 to submit additional comments on the issue. The Band and State submitted additional comments to the Region on December 5 and 7, respectively [Attachments 2 and 3].

The State of Wisconsin asserts that, pursuant to the equal footing doctrine and the Northwest Ordinance of 1787, it gained ownership of all lake beds within its borders when it achieved statehood in 1848. The State also argues that the 1939 Executive Order creating the reservation does not expressly convey the lake beds to the Band and exigent circumstances which would suggest that conveyance was implicit in the creation of the reservation did not exist at the time of the Executive Order. In the absence of such express conveyance or exigent circumstances, the State maintains, the lake beds could not have been transferred from State ownership. Finally, the State asserts that any claim of authority the Band has over streams and streambeds is subject to the Public Trust Doctrine, which charges the State with the duty of administering and protecting all navigable waters within the State for the good of the public.

After consultation with the Office of General Counsel and the Department of the Interior's Office of the Solicitor, ORC believes that we need not reach the issue of ownership of water beds within the reservation to resolve the competing

claim of jurisdiction. The statutory scheme of the Clean Water Act does not link ownership of lake beds with regulation of water quality. Rather, the Act contemplates geographic location of the water resources as the determinative factor. Section 518(e) (2) of the Act clearly expresses Congress's intent that American Indian Tribes are the appropriate authorities to manage and protect water resources within reservations. Therefore, we do not reach the issue of whether the State owns lake beds within the Mole Lake reservation. In addition, we believe that the Congressional intent that Tribes regulate water quality within reservations preempts any claim that the State may have under the Public Trust Doctrine to regulate the water quality of streams within the reservation. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

For these reasons, we believe that the Band has the authority to regulate water quality within its reservation and recommend that, pursuant to 40 C.F.R. § 131.8(c) (4), you determine that the Band has adequately demonstrated that it meets the jurisdictional requirements of 40 C.F.R. § 131.8(a) (3).

Attachments

cc: Jo Lynn Traub

ATTACHMENT 1

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
101 South Webster Street
Box 7921
Madison, Wisconsin 53707
TELEPHONE 608-266-2621
TELEFAX 608-267-3579
TDD 608-267-6897

November 4, 1994 M-2802

Mr. Valdas V. Adamkus
Administrator, Region V
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Il 60604-3590

SUBJECT: Mole Lake Band of the Lake Superior Tribe of Chippewa Indians Request for Authority under Section 303 of the Clean Water Act

Dear Mr. Adamkus:

On October 7, 1994 I received from you a letter dated October 5, 1994 regarding the above-referenced request for authority. You indicated in your letter that this agency has 30 days from the receipt of your letter to comment on possible competing claims of jurisdiction. This letter is intended to provide those comments. For the reasons stated below, we request an additional 90 days to finalize comments on this request.

Before I comment on possible issues of jurisdiction, I would like to comment generally on our relationship with the Chippewas.

For well over a decade the State of Wisconsin and the Chippewas have been involved in litigation and in less formal dispute resolution forums regarding how natural resources ought best be managed, and who should do the managing. While we may have differences on these issues, I am personally convinced that the Chippewas have a deep and abiding interest in the protection of these resources. With respect to implementation of the Clean Water Act, we have a strong interest in working with tribal authorities throughout Wisconsin to develop, where appropriate, mutually acceptable approaches to protection of water quality. Consequently, nothing which follows should be taken as a statement critical of the Mole Lake Band's interest in proper resource management.

As noted above, your request is for comments on "possible competing claims of jurisdiction." The Department does believe there may be a significant jurisdictional claim on behalf of the State that may inhibit application of section 303 status to Indian Tribes in Wisconsin.

Under what has come to be known as "Wisconsin's Public Trust Doctrine," the State of Wisconsin was granted title to the beds of all navigable waters in the state. The origin of this doctrine is found in the 1783 Virginia Act of Session, Northwest Ordinance, Act of July 13, 1787, article IV, I Stat. 51. Subsequent case law has held that state title to navigable waters superseded rights gained by the tribes in federal treaties which created their reservations. These state rights may preclude granting to tribes in Wisconsin Section 303 "State" designation.

As you can see, this is a complex legal issue. Rather than try to produce a final position within a short 30-day comment period, I am requesting that the Department be provided an additional 90 days from the date of this letter to complete our comments. I think this is a reasonable request, particularly in light of the fact that your letter only asked for an

identification of "possible" claims of jurisdiction. I believe that it is in the best interests of everyone if we proceed to address this issue before proceeding further with a section 303 "State" designation. A 90 day period for completion of comments on this most important of issues seems very reasonable.

Sincerely,

/s/ "George"
George E. Meyer
Secretary

ATTACHMENT 2

SOKAOGON CHIPPEWA COMMUNITY
MOLE LAKE BAND
RT. 1, BOX 625
CRANDON, WISCONSIN 54520-9635
(715) 478-2604

December 5, 1994

Valdas V. Adamkus, Administrator
United States Environmental Protection Agency
Region-V
Regional Administrator's Office, 19th Floor, Metcalf Building
77 W. Jackson Blvd.
Chicago, IL 60604-3590

Subject: Mole Lake Band of the Lake Superior Chippewa Tribe, CWA Section 303 Treatment as A State (TAS) Application.

Dear Val:

Thank you for the opportunity to address the State of Wisconsin's comments on this Tribe's TAS application. I am encouraged to see that the approval process is moving ahead quickly. My legal staff has provided a summary response to the States competing claim of jurisdiction. This is attached for your review and consideration.

My staff has informed me that you will consult with the Department of Interior (DOI) on these matters. We respectfully request to be notified of all correspondence with DOI. We are confident that we are able to assist both your Agency and DOI as the consultation process proceeds.

The water quality standards we provided to you on November 18 are currently being reviewed based on

comments from the water division. We hope to respond before the holidays.

We look forward to receiving TAS and program delegation in the near future. I will discuss this and other matters with you as we continue to work together toward improving Tribal relations with the Agency and the protection of the Reservation environments.

Sincerely,

/s/
Arlyn Ackley, Sr., Tribal Chairman
Mole Lake Band of the Lake Superior Chippewa
Sokaogon Chippewa Community

enc. TAS Response – Mole Lake Legal Department

SOKAOGON CHIPPEWA COMMUNITY
MOLE LAKE BAND
RT. 1, BOX 625
CRANDON, WISCONSIN 54520-9635
(715) 478-2604

Memorandum

To: Arlyn Ackley Sr., Tribal Chairman

CC: John Griffin/DuWayne Derickson

From: Legal Department

Date: December 5, 1994

Subject: Sokaogon Chippewa Community's Request for Program Authorization Under Clean Water Act Section 303.

In accordance with the November 18, 1994 EPA Region V letter, in which the agency requested information from the tribe by December 5, 1994, the following are reasons for the agency to reject the State of Wisconsin's (WDNR's) claim of competing jurisdiction, as that jurisdiction might apply to the tribe's right to gain "treatment as State" designation, and to the tribe's right to set water quality standards on waters within its reservation.

The WDNR, in its November 4, 1994 letter to the EPA, claims that the State of Wisconsin's Public Trust Doctrine, and accordingly the State of Wisconsin's title to beds of navigable waters within the State, "may preclude granting to tribes in Wisconsin Section 303 "State" designation." The State fails to recognize the specific

purpose of the Clean Water Act, especially the 1987 amendments, which show the federal government's manifest intent to allow tribes to regulate water quality within the tribe's reservation.

By enacting the Federal Water Pollution Control Act, 33 U.S.C.S. § 1251, et. seq. (1994) (popularly known as the "Clean Water Act"), Congress declared its intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.S. § 1251(a)(1994). The "waters of the United States" encompass "bodies of waters wholly within a state whose use or misuse could affect interstate commerce." 40 C.F.R. § 230.3. By rule and by federal court decision, "waters of the United States" include waters overlying streams and lakebeds to which a state holds title. United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

The 1987 Amendments to the Clean Water Act added a new section 518 which required EPA to promulgate regulations specifying how the Agency would treat qualified Indian Tribes as States for the purposes of, among others, the § 303 (water quality standards) and § 401 (certification) programs. In its final rule, 40 C.F.R. pt. 131, (effective January 1, 1992) the EPA recognized the federal government's intent to allow Tribes to regulate surface water quality within the tribe's reservation. In promulgating its final rule, the EPA made the following comment on the tribe's right to set water quality standards:

> EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confined by the text and legislative history of section 518 itself...the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation

> water resources. As Senator Burdick, floor manager of the 1987 Clean Water Act Amendments explained, the purpose of section 518 was to "provide for clean water for the people of the Nation." 133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes" ...the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." Id., cited in 56 Fed. Reg. 64878-79 (1991). (emphasis added).

Because federal preemption principles apply, neither the Wisconsin Public Trust Doctrine, nor the State of Wisconsin's alleged ownership of the beds of navigable waters in Wisconsin allows the State to compete with the tribe's right, pursuant to federal legislation and agency rule, to receive "treatment as State" status, and to set surface water quality standards. Federal preemption occurs when a state law conflicts with a valid exercise of a congressional power. The federal law overrides any contrary state law pursuant to the Supremacy Clause, U.S. Const., art. VI, sec. 2. A federal statute or an agency regulation can preempt state authority. Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979).[1]

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[1] Another case that shows the preemption power of a federal law or agency regulation over alleged State authority is Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981). Pursuant to the Boundary Waters Canoe Area Wilderness Act of 1978, the Department of Interior prohibited the use of motorized crafts within the federal reservation (Boundary Waters Canoe Wilderness Area). The State of Minnesota argued against the prohibition of motorized crafts, by arguing the regulation affected state-owned waters. Acknowledging that the State of Minnesota owns the beds of all the lakes and rivers within the federal reservation (BWCWA), the court held, pursuant to the Supremacy Clause (U.S. Constitution), that the federal regulations, based on congressional intent, applied to the state-owned waters within the federal reservation.

The WDNR has hinted that State of Wisconsin v. Baker, 698 F.2d 1323 (1983) supports the State's claim of competing jurisdiction. The WDNR will likely argue that language found at page. 1335 of the Baker opinion supports the WDNR's claim against the Sokaogon Band:

> [W]e agree with Judge Doyle that the 1854 treaty did not convey to the Band (Lac Courte Oreilles Band of Lake Superior Chippewa) sovereignty over navigable waters within its reservation and that exclusive sovereignty over them is in the State. 524 F.Supp. at 733-35. Baker at 1335.

Unlike the Lac Courte Oreilles Band in Baker, the Sokaogon Band's right to obtain "TAS" status, and to set water quality standards on its reservation waters arises from specific federal law, not from a treaty. The 1987 CWA Amendments, including sec. 518 are more recent than the 1983 Baker decision.

Furthermore, a 1987 United States Supreme Court decision, Utah Division of State Lands v. United States, et al., 482 U.S. 193 (1987), again enunciates the principle that the Federal Government maintains control of navigable waters overlying state-owned lakebeds. Utah Division was a dispute between the federal and state government over oil and gas leases on state-owned lakebeds. The Court ultimately held for the State of Utah, using the "equal footing doctrine" as the basis for the State's right to title of the bed. However, the Court distinguished the Federal Government's rights to the waters over the state-owned beds:

> **[M]oreover, even if the land under navigable waters passes to the State, the federal government may still control, develop, and use the waters for its own purposes.** Arizona v. California, 373 U.S.

> 546, 597-98 (1963). Congress for example, may intend to create a reservoir, but also intend to let the State obtain title to the land underneath the reservoir upon entry into statehood. Such an intent is not unusual. In Montana v. United States, 450 U.S. 544 (1981), we found that Congress intended to permit the State to take title to the bed of a navigable river even though the river was in the midst of an Indian Reservation, and in United States v. Holt State Bank, supra, we held that Congress intended the State to hold title to the bed of a navigable lake wholly within the boundaries of an Indian Reservation. Utah Division at 202. (emphasis added)

Therefore, Baker's claim that "exclusive sovereignty over them [navigable waters] is in the State" overstated the State's power in relation to conflicting federal power. The Federal Government has recognized that Tribes may be treated as States, and indeed, as explained above, that Tribes would be given preference in setting water quality standards on the Tribes' reservations. Tribes qualify for treatment as states for purposes of grants for pollution control programs, grants for the construction of treatment facilities, establishment of water quality standards and tribal implementation plans, implementation of permit systems, and participation in the clean lakes program. See C.W.A., 33 U.S.C. sec. 1377(e) (1994). Congressional intent and recent caselaw supports preemption of the State of Wisconsin's alleged claims of competing jurisdiction. Therefore the Sokaogon Chippewa Community should respectfully request that the EPA Region V grant the Tribe's CWA section 303 Treatment as A State for program authorization.

ATTACHMENT 3

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
101 South Webster Street
Box 7921
Madison, Wisconsin 53707
TELEPHONE 608-266-2621
TELEFAX 608-267-3579
TDD 608-267-6897

December 7, 1994 M-2802

Mr. Valdas V. Adamkus,
Administrator, Region IV
United States Environmental
Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Via FAX: 12-5-94

Via U.S. Mail: 12-6-94

SUBJECT: Continuation of State Comments Regarding the Mole Lake Band's Request for Authority under Section 303 of the Clean Water Act

Dear Mr. Adamkus:

Thank you for the opportunity to expand our comments on the Mole Lake Band's request for jurisdiction over navigable waters for the purpose of establishing water quality standards.

The State of Wisconsin enjoys sovereignty over all navigable waters located within state boundaries based on the public trust doctrine and the underlying equal footing doctrine. The public trust doctrine provides that the State, in its sovereign capacity, bears the responsibility of insuring that all navigable waters are maintained and protected for public use. The public's right to the use of all navigable waters, and the

state's duty to protect those waters, vested at the time of Wisconsin's admission to the Union in 1848.

The equal footing doctrine is based on English common law principles which dictate that ownership of submerged lands is of the utmost importance to the sovereign's ability to control the use of navigable waters. Moreover, according to English common law, all submerged lands beneath navigable waters were presumed to be owned by the sovereign. Shively v. Bowlby, 152 U.S. 2, 11-12 (1894). Therefore, when the thirteen original colonies gained their independence from Great Britain, they succeeded to the English crown's title to the beds and banks of navigable waters. Pursuant to the continuing adherence to this doctrine, the Northwest Ordinance of 1787 declared that when new states were created from the lands within the Northwest Territory (which included Wisconsin), these states were to enjoy the same status as the original thirteen colonies upon admission to the Union. The thirteen original states ceded the Northwest Territory to the federal government on several conditions. Specifically, the federal government was (1) to hold lands underlying navigable waters only in trust for the future States, (2) to admit all new states to the Union with the same rights of sovereignty as the original states, and (3) to allow the navigable waters of these new states to be "common highways and forever free."

Title to submerged lands vested automatically in the state upon admission to the Union without further action from Congress. Shively, 152 U.S. at 15. Based on the "equal footing" and "public trust" doctrines, the Wisconsin Supreme Court has held that:

> The United States never had title, in the Northwest Territory... to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there

> continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Illinois Steel Co. v. Bilot, 109 Wis. 418, 426 (1901).

Thus, when Wisconsin achieved statehood in 1848, ownership of all submerged lands under navigable waters vested in the State. Wisconsin subsequently embraced and preserved the "forever free" concept for navigable waters through passage of the Wisconsin Enabling Act, sec. 3, 9 Stats. 56, and under the State Constitution. Const., art. IX, sec. 1. Numerous cases throughout the state's history reaffirm the public's right to the use of all navigable waters within the boundaries of the state. See generally Diana Shooting Club v. Husting, 156 Wis. 261 (1914); Muench v. Public Service Commission, 261 Wis. 492 (1952).

The establishment of the Mole Lake Reservation in 1939 with the purchase of 1,680 acres by the federal government could not create tribal ownership of submerged lakebeds within or adjacent to the reservation. These lands (i.e. the lakebeds) were already owned by the State of Wisconsin. The United States Supreme Court has stated that the presumption should always be against the transfer of ownership of submerged lands.

In Montana v. United States, 67 L.Ed 2d 493 (1981), the United States Supreme Court discussed the effect of the creation of an Indian reservation on state ownership of submerged lands. Id. at 501. The Court concluded that since the control over submerged lands beneath navigable waters is so strongly identified with the sovereign power of government, "it will not be held that the United States has conveyed such land except because of some international duty or public exigency." Id. at 502. The Court further noted that courts should "begin with a strong presumption against conveyance by the United States and must not infer such a

conveyance .. unless the intention was definitely declared or otherwise made plain." Id.

Thus, according to Montana, the presumption is strong against a conveyance of submerged lands to a tribe upon the creation of a reservation. Such a conveyance can only be shown if (1) the intent to transfer title to submerged lands is specifically expressed in the language of the treaty or (2) if exigent circumstances existed at the time of the signing of the treaty which would suggest that the conveyance was implicit in the creation of the reservation. Here the reservation was not created by the treaty, but by an executive order issued pursuant to Section 7 of the Indian Reorganization Act of 1934, 25 U.S.C. 467. The state is aware of no metes and bounds description of the reservation which would include navigable lakebeds. Rather, the reservation was created by the purchase of upland acreage. In any case there is no treaty record of an intent to abrogate the state's rights to navigable waters. In Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983), the Seventh Circuit Court of Appeals applied this standard to another Wisconsin Chippewa tribe's claim to jurisdiction over navigable waters. The court interpreted the relevant treaty language, and ruled that establishing a reservation "for the use of" the Chippewa tribe did not explicitly transfer jurisdiction over navigable waters within the reservation to the tribe. The Court also rejected the Tribe's contention that the circumstances at the signing of the treaty were sufficiently exigent to imply that the federal government intended to transfer sovereignty to the Tribe.

Finally, any claim of authority over streams and streambeds must also be examined in light of the Public Trust Doctrine. While Wisconsin law recognizes that streambeds are owned by the adjacent riparian, this right is subject to the pre-existing rights of the State of Wisconsin under the Public Trust Doctrine. The State of Wisconsin is charged with the duty of administering and protecting all navigable waters for the good of the public and insuring that all navigable waters

remain "forever free" for the people to use. Wis. Const., art. IX., sec. 1. Private ownership of the land beneath navigable waters is subject to the state's sovereignty over those waters which was obtained upon statehood and its powers to preserve them as "forever free" and open for public use.

The Mole Lake Band, in spite of its quasi-sovereign status has only very limited authority to regulate the waters within its reservation boundaries. While the State of Wisconsin is not attempting here to assert jurisdiction over the activities of the Mole Lake Band, it must question the ability of the band to control the activities of others on any public waterways that are held to be within its reservation. To put it simply, EPA may have the authority to delegate state status, but the Mole Lake Band does not have jurisdiction to fully implement that authority.

Sincerely,

/s/
George E. Meyer
Secretary

v:\9501\lc9adamk.mal

cc: Governor Tommy Thompson
Attorney General James Doyle
Arlyn Ackley, Chairman, Sokaogon Chippewa Community
Erhard Huettl, Chairman, Forest County Board

33 U.S.C.S.

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards. (1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall

promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations. (1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he

publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) **Review; revised standards; publication.** (1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for

such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days

after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) **Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.** (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take

into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal

discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process. (1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The

Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance. Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards. Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards. For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria. (1) Adoption by States. (A) Initial criteria and standards. Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards. Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt. (A) In general. If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and

pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception. If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability. Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

§ 1377. Indian tribes

(a) Policy. Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

(b) Assessment of sewage treatment needs; report. The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter, and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

(c) Reservation of funds. The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one- half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes, as defined in subsection (h) of this section and former Indian reservations in Oklahoma (as determined by the Secretary of the Interior) and Alaska Native Villages as defined in Public Law 92-203 [43 USCS §§ 1601 et seq.].

(d) Cooperative agreements. In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as States. The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if—

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of a project. Not later than 18

months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

(f) Grants for nonpoint source programs. The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

(g) Alaska Native organizations. No provision of this chapter shall be construed to—

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or

(3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.

(h) Definitions. For purposes of this section, the term—

(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

CODE OF FEDERAL REGULATIONS
TITLE 40--PROTECTION OF ENVIRONMENT
CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D--WATER PROGRAMS
PART 131--WATER QUALITY STANDARDS
SUBPART A--GENERAL PROVISIONS

s 131.8 Requirements for Indian Tribes to administer a water quality standards program.

(a) The Regional Administrator, as determined based on OMB Circular A-105, may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in s 131.3 (k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for administration of a water quality standards program should be submitted to the lead EPA Regional Administrator. The application shall include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;

(ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

(iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience which may include, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C.

2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(6) Where the Tribe has previously qualified for eligibility or treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.

(c) Procedure for processing an Indian Tribe's application.

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to s 131.8(b) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(2) Within 30 days after receipt of the Indian Tribe's application, the Regional Administrator shall provide appropriate notice. Notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters; and

(ii) Be provided to all appropriate governmental entities.

(3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(4) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of s 131.8(a)(3).

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, he shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the Water Quality Standards program.

[56 FR 64895, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994]

CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY

Source: 57 FR 28087, 28088, June 24, 1992, unless otherwise noted.

PART 131--WATER QUALITY STANDARDS

Authority: 33 U.S.C. 1251 et seq.

Source: 48 FR 51405, Nov. 8, 1983; 57 FR 60910, Dec. 22, 1992, unless otherwise noted.

56 FR 64876 Thursday, December 12, 1991

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH-FRL-4038-8]

Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations

AGENCY: Environmental Protection Agency

ACTION: Final rule.

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C. Response to Public Comments

* * *

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1. Treatment of Tribes as States

Comments on the Authority Requirements

a. The Scope of Inherent Tribal Authority

Comment: The issue of whether and how EPA should require Tribes to demonstrate that they meet the requirements of section 518(e)(2) of the CWA, i.e., that they can demonstrate authority to regulate water quality within the boundaries of their reservations, attracted significant comment. Numerous commenters remarked on the significance of the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, (1989) for EPA's programs and today's regulations, although there were widely differing views of how to read the decision. Several

commenters asserted that *Brendale* clearly indicates that an Indian Tribe may not enforce its water quality standards against non-members of the Tribe on non-Indian-owned fee lands within the boundaries of the reservation or that, at the very least, the Tribe must include detailed factual information that describes the non-Indian lands the Tribe proposes to regulate and the reasons supporting its jurisdictional assertions.

By contrast, other commenters asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing. These commenters asserted that such authority over environmental matters was recognized in *Montana v. United States*, 450 U.S. 544 (1981), and not diminished by *Brendale*.

Response: EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority (an issue discussed in detail below). In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. The decision reflects some difficult issues in this area of the law and, as the comments indicated, has generated considerable controversy over the extent of Tribal authority.

Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana v. United States*, which previously had held that:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate * * * the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements * * *. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

In *Brendale*, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe, 492 U.S. at 443-444 (Stevens, J., writing for the Court); id. at 449-450 (Blackmun, J. concurring). Conversely, the Court found no Tribal jurisdiction where the proposed activities "would not threaten the Tribe's * * * health or welfare." Id. at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana*.

As further discussed below, EPA agrees with certain commenters that pending further judicial or *64878 Congressional guidance on the extent to which section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis and has finalized the proposed process for making those determinations. Thus, EPA rejects the suggestion of other commenters that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application. This is consistent with the approach the Agency adopted under the Safe Drinking Water Act, when it determined that it would not "automatically assume," or adopt, in the first instance, a rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence. See 53 FR 37396, 37399

(September 26, 1988). Nonetheless, EPA sees no reason in light of *Brendale* to assume that Tribes would be per se unable to demonstrate authority over water quality management on fee lands within reservation borders. Rather, as discussed below, EPA believes that as a general matter there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation.

In evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale*. The extent of such tribal authority depends on the effect of that activity on the tribe. As discussed above, in the absence of a contrary statutory policy, a tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565-66. However, in *Brendale* several justices argued that for a tribe to have "a protectable interest" in an activity, the activity's effect should be "demonstrably serious." *Brendale*, 1492 U.S. at 431 (White, J.). In addition, in a more recent case involving tribal criminal jurisdiction, a majority of the Court indicated in dicta that a tribe may exercise civil authority "where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." Duro v. Reina, 110 S.Ct. 2053, 2061 (1990). See also *Brendale*, 492 U.S. at 450 (Blackmun, J.) (test for inherent tribal authority whether activities "implicate a significant tribal interest"); id. at 462 (Blackmun, J.) (test for inherent tribal authority whether exercise of authority "fundamental to the political and economic security of the tribe").

As discussed above, the Supreme Court, in recent cases, has explored several options to assure that the impacts upon tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than de minimis, although to date the Court has not agreed, in a case on point, on any one

reformulation of the test. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on tribes or create the administratively undesirable result of checkerboarding reservations.

Whether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality. See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 476-77 and notes 6, 7 (1987). As a result, in making the required factual findings as to the impact of a water-related activity on a particular tribe, it may not be necessary to develop an extensive and detailed record in each case. The Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, bottom sediments, spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that Congressional enactment of the Clean Water Act establishes a strong federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)) and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable (section 101(a)(1)-(2)). Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.

EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,

[and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" section 101(b). By extension, *64879 the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation." 133 Cong. Rec. S1018 (daily ed. Jan 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes * * * the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." Id.

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for tribal management of water quality within the reservation are entitled to substantial deference. Washington Dept. of Ecology v. EPA, 752 F. 2d 1465, 1469 (9th Cir. 1985); see generally Chevron, USA v. NRDC, 467 U.S. 837, 843-45 (1984).

The Agency also believes that the effects on tribal health and welfare necessary to support Tribal regulation of non-Indian activities on the reservation may be easier to establish in the context of water quality management than with regard to zoning, which was at issue in *Brendale*. There is a significant distinction between land use planning and water quality management. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation * * * does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 587 (1987). The Court has relied on this distinction to support a finding that states retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by federal law. Id. at 587-89.

Further, water quality management serves the purpose of protecting public health and safety, which is a core

governmental function, whose exercise is critical to self-government. The special status of governmental actions to protect public health and safety is well established.[3] By contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety. See e.g. *Brendale*, see, e.g., *Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision). Moreover, water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.

Operationally, EPA's generalized findings regarding the relationship of water quality to tribal health and welfare will affect the legal analysis of a tribal submission by, in effect, supplementing the factual showing a tribe makes in applying for treatment as a State. Thus, a tribal submission meeting the requirements of s 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental

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[3] This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. See Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 491 n. 20 (1987); Id. at 512, (Rehnquist, C.J., dissenting).

entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

The Agency recognizes that jurisdictional disputes between tribes and states can be complex and difficult and that it will, in some circumstances, be forced to address such disputes. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction.

b. The Effect of Section 518 on Tribal Authority over Non-Indian Activities

Comment: EPA has received letters from three members of Congress, Senator Simpson, Senator Baucus, and Representative Morrison, regarding the impact of *Brendale* on EPA's Indian Policy and the development of "treatment as a State" regulations for EPA water programs in light of the legislative history of section 518. All three commenters asserted that Congress did not intend to expand the scope of Tribal authority over non-Indians on the reservation by the passage of section 518.

Rep. Morrison asserted that he inserted into the Congressional Record a memorandum written by staff on the House Committee on Interior and Insular Affairs regarding section 518 (also inserted into the Congressional Record by Senator Adams at 133 Cong. Rec. S753-54 (daily ed. January 14, 1987)) solely to demonstrate that section 518 was not intended to expand Tribal water quantity rights. 133 Cong. Rec. H184-85 (daily ed. Jan 8, 1987). Rep. Morrison disavowed other statements from that memorandum which might support the proposition that Congress intended to authorize Tribal jurisdiction over non-members on reservations. ("Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources." Id. (emphasis added)). Rep. Morrison stated his belief that Congress did not, by the passage of section 518, expand the scope of Tribal

authority over non-Indians. In light of this legislative history, Rep. Morrison asserted that, consistent with *Brendale*, EPA should not allow Tribal regulation of non-members on so-called "open" reservations.

Senators Baucus and Simpson also recommended that EPA consider the legislative history of section 518(e) and the *Brendale* decision and determine not to allow Tribal regulation over non-members on the reservation.

Finally, all three of these Congressional commenters asserted that the legislative history of section 518 clearly shows that it was not intended to affect rights to water quantity under State law. The concerns raised by these Members of Congress echo other comments discussed elsewhere in today's notice. Several commenters asserted that section 518(e)(2) should not be read as an express grant of Congressional authority to Indian Tribes to regulate such fee lands, despite indications in *Brendale* to the contrary.

By contrast, Senators McCain, Burdick, and Inouye expressed a view that section 518(e) delegates Tribes authority to regulate all waters within reservation boundaries including those on non-Indian fee lands. Some *64880 commenters cited *Brendale* for this proposition. The latter argument of these commenters is based upon the opinion of Justice White in *Brendale*. Justice White indicates that certain statutes may delegate Federal authority to Tribes, thereby providing a basis for authority over all lands within a reservation. As Justice White explained, on the record in *Brendale* there could be no contention * * * that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1) (1982 ed., Supp. V) [i.e., sections 518(e) and 518(h)(1) of the CWA]. 492 U.S. at 428 (1989) (White, J.) (emphasis added). This language clearly categorizes the two cited statutory schemes as express delegations of Federal authority. Thus, Justice White, inter alia, cites the Clean Water Act as an example of an explicit delegation of authority over non-Indian activities to Indian Tribes. *Response*: EPA has fully considered the Congressional

comments and their interpretation of the legislative history of section 518. EPA must, of course, consider contemporaneous legislative history as it is written, and has been cautioned not to rely on subsequent statements by Members of Congress. Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (DC Cir. 1989), cert. denied, 111 S.Ct. 139 (1990).

EPA differs with the Congressional commenters to the extent that they suggest the legislative history of section 518 is clear and expresses an intent to limit the scope of Tribal authority. EPA notes that other legislative history might be interpreted as evincing Congressional intent to confer expanded Tribal authority over non-Indians within the reservation.

In particular, the following colloquy between Senators Inouye and Burdick on this issue is very relevant:

Mr. Inouye: * * * I am concerned about section 518(e)(2). As I read that provision, it enables qualified Indian tribes to exercise the same water quality regulatory jurisdiction with respect to water that traverses, borders, or is otherwise located within their reservations [paraphrasing section 518(h)(1) and 18 U.S.C. 1151(a)] that States have for regulation of water outside Indian reservations. Is my understanding of Section 518(e) correct

Mr. Burdick: Yes. The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water.

133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987) (emphasis added). Senator Inouye's statement could arguably support a reading that Congress intended to recognize Tribal authority over all waters within the reservation, including those managed by non-Indians. Mr. Burdick, a member of the Conference Committee, agrees with Senator Inouye's statement.

However, in EPA's view this colloquy is ambiguous and inconclusive. Senator Burdick, in responding to Senator Inouye, agrees that under section 518 Tribes may regulate waters only if they are already "within Indian jurisdiction."

However, Senator Burdick was only recognizing the status quo, i.e., whatever is within Indian jurisdiction may be regulated via section 518. Senator Burdick's statement does not clearly show that he--or the Congress as a whole--intended to legislate that all waters within the reservation are in fact "within Indian jurisdiction." Thus, the colloquy is circular: Indians have jurisdiction if, but only if, they have jurisdiction from some source other than section 518. It does not clearly indicate whether Congress intended to expand what lies "within Indian jurisdiction."

Further, if this colloquy were to be construed as supporting an expansion of tribal authority, it would arguably conflict with a statement Senator Burdick had made earlier in response to an inquiry from Senator Baucus. In that discussion, Senator Burdick reiterated that section 518 was not intended to affect existing water quantity rights, and added that "[p]rivate lands and water rights owners within boundaries of Indian reservations are not to be additionally affected by this act." 133 Cong. Rec. S753 (daily ed. January 14, 1987) (emphasis added). This could suggest that the Act was not intended to alter the status quo regarding regulatory authority over fee lands.

The legislative history in the House is also unclear as to whether Congress intended to expand tribal power over non-Indians. The statement in the House staff memorandum cited above supports a view that under current case law Tribes already possess regulatory authority over non-Indians within reservation boundaries; thus it would be unnecessary to delegate such authority to tribes. Insertion of this memorandum into the Congressional Record could suggest that the House agreed with that view; however, this aspect of the memorandum was never the subject of House discussions, which focused almost exclusively on issues relating to water rights.

EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee

reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. See *Montana*, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana*, *Brendale*, and other applicable case law.

EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law. EPA believes that this approach will best effectuate the overall purposes of the statute.

EPA agrees with those commenters who stated that Justice White's opinion in *Brendale* can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in *Brendale*. Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. The passing reference in that opinion does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above, EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

EPA agrees with the Congressional commenters that section 518 does not affect existing water quantity rights. This has been the Agency's consistent position, based on the language of sections 101(g) and 518(a).

* * *

*64881

d. Treatment as a State for Off-Reservation Waters Within Inherent Tribal Authority

Comment: Several comments were received regarding the geographic scope of programs authorized under section 518(e)(2). The provision authorizes EPA to treat a Tribe as a State for water resources which are :

held by an Indian Tribe, held in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

(emphasis added)

EPA has consistently read the phrase "or otherwise within * * *" as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation.

* * *

Response: Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality. ... As discussed above, EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation *64882 if the Tribe can demonstrate the requisite authority over such water resources.

* * *

*64885

Comment: EPA should clarify what happens if a Tribe is denied treatment as a State (s 131.8 (c)(5)). ...

Response: Rather than formally deny the Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the Tribal program so that Tribal recognition as a State may occur.

LANDS PROCLAIMED TO BE AN INDIAN RESERVATION FOR USE OF SOKAOGON CHIPPEWA COMMUNITY

Wisconsin

June 30, 1939

By virtue of authority contained in Section 7 of the Act of June 18, 1934 (48 Stat. 984), the lands described below, acquired by purchase under the provisions of Section 5 of that Act, are hereby proclaimed to be an Indian reservation for the use and benefit of the Sokaogon Chippewa Community:

T. 35 N., R. 12 E., 4th P. M.

E1/2SW1/4, SE1/4 Section 20.

SW1/4, NE1/4SE1/4, W1/2SE1/4 Section 21.

Government lots 1 and 2, Section 22.

SW1/4NW1/4, Section 26.

Government lot 2, Section 27, except that part bounded and described as follows: Commencing at a point on the east and west quarter line of Section 27, T. 35 N., R. 12 E., which is 76 rods and 16 links west of the quarter post between Sections 26 and 27 in said township, and running thence west along said quarter line 479 feet to the meander line on the lake; and thence north 45° east, or along the meander line of said lake 841.5 feet to a point in the meander line; thence south 32° east 475 feet; thence south 62° west 379.5 feet to place of beginning.

Government lot 3, Section 27. subject to a right of way of State Trunk Highway No. 55 and excepting the following described parcel: Commencing at the NW1/4SE1/4 of said section; thence south 67.5 feet to western edge of State Aid Highway 55; thence southwesterly along said highway 148 feet; thence north 32°30' west to north line of said NW1/4SE1/4; thence east to place of beginning.

Government lots 4 and 5, Section 27, excepting the right of way of a public road over and across said lots and a certain portion of Lot 5 described as follows: Commencing at the southwest corner of said Government lot 5; thence east on the south line of said Government lot 5 a distance of 7 rods; thence north parallel with the west line of said section to the high water mark of Swamp Creek or the outlet of Rice Lake; thence westerly along the high water mark of Swamp Creek or the outlet of Rice Lake; to the section line between Sections 27 and 28; thence north along said section line to the place of beginning.

Government lots 6 and 7, Section 27.

NE1/4SE1/4 Section 27, excepting therefrom a tract of land described as follows: Commencing at the northwest corner of the NE1/4SE1/4 of said Section 27; thence running south 67.5 feet to the western edge of State Highway No. 55; thence in a northeasterly direction along the edge of said highway 172.4 feet to the east and west quarter line of said Section 27; thence westerly along said quarter line 152 feet to the place of beginning.

Government lots 1, 2 and the east 70 rods of Government lot 3, Section 28.

Government lots 4 and 5, Section 28, except that portion of lot 5 described as follows: Commencing on the southeast corner of Section 28; thence running west 18 rods; thence north 18 rods; thence east 18 rods; thence south 18 rods to place of beginning.

N1/2NE1/4, SW1/4NE1/4, W1/2SE1/4 and SW1/4 Section 28.

Government lot 2, Section 29.

All of the said lands being within Forest County, Wisconsin, containing a total of 1,437.60 acres, more or less.

OSCAR L. CHAPMAN,

Assistant Secretary of the Interior.

Sokaogon Chippewa Community, Wis.; Proclaiming Certain Lands as Part of Sokaogon Chippewa Community (Reservation)

April 8, 1982.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary–Indian Affairs by 209 DM 8.1.

On April 8, 1982, pursuant to authority contained in section 7 of the Act of June 18, 1934 (48 Stat. 986; 25 U.S.C. 467), the following described land, located in Forest County, Wisconsin, was added to and made a part of the Sokaogon Chippewa Community (Reservation).

4th Principal Meridian

Parcel A
T. 35 N., R. 12 E.,
Sec. 21. SE1/4SE1/4;
Sec. 22. Government Lots 3 and 4 and W1/2SW1/4.

Parcel B
T. 35 N., R. 12 E.,
Sec. 27, Part of Lot 5 described as
Commending at the Southwest corner of Lot 5, thence east 7 rods, thence north parallel with section line to the high water mark on Swamp Creek, to the section line between Secs. 27 and 28. thence south on section line between Secs. 27 and 28 to the place of beginning.

Parcel C
T. 35 N., R. 12 E.,
Sec. 26, described as: that portion of the NW1/4NW1/4, lying west of State Trunk Highway #55, further described as beginning

at the corner to Secs. 22, 23, 26 and 27, thence east along section line a distance of 1,226 ft., more or less to the center line of State Trunk Highway 55. thence south 29°30' west along the centerline of State Truck #55 a distance of 1,510 ft., more or less, to the south line of NW1/4NW1/4 of Sec. 26. thence west on the south line of NW1/4NW1/4 Sec. 26 a distance of 477 ft. more or less to the section line between Secs. 26 and 27. thence north on said section line a distance of 1,320 ft., more or less to section corner and point of beginning containing 25.80 acres.

Sec. 27, Government Lot 1.

Parcel D

T. 35 N., R. 8 E.,

Sec. 27, Part of Lot 8 described as:

Beginning at a point on the section line between Sections 27 and 28, T. 35 N., Range 12 E., which is designated as the northwest corner of the SW1/4SW1/4. Sec. 27, T. 35 N., R. 12 E., thence run south along the said section line 24 rods, more or less, thence east 43 rods to the west line of the Military Road, now State Trunk Highway 55, thence in a northeasterly direction along the west line of said State Trunk Highway 55, 41 rods, more or less, to a point where said State Trunk Highway 55 intersects the north line of SE1/4SW1/4 of said Section 27, in said township and range, thence west along the north line of said SW1/4SW1/4 80 rods, more or less, to the point of beginning.

Parcel E

T. 35 N., R. 12 E.,

Sec. 27, part of SW1/4SW1/4 described as:

Commencing at a point 33 ft. north of the corner of Secs. 27, 28, 33, and 34 on the section line between Secs. 27 and 28, thence running north on the section line between Secs. 27 and 28 for a distance of 743 ft., this shall be place of beginning. thence north 100 ft., thence east 80 ft. thence south 100 ft., thence west 80 ft. to place of beginning.

Parcel F
T. 35 N., R. 12 E.,

Sec. 27, Lots 2 and 3(c) of Government Lot 8 described as: Beginning at a point 33 ft. north of the corner of Secs. 27, 28, 33 and 34, on the section line between 27 and 28, thence running north on the section line between 27 and 28 a distance of 843 ft., thence east on 4 degrees, 82 ft., this shall be the place of beginning, thence east on 4 degrees, 164 ft., thence south 100 ft., thence west 164 ft., thence north to the place of beginning.

Parcel G
T. 35 N., R. 12 E.,

Sec. 27, SW1/4SW1/4 Lots 4, 5 and 6 of Government Lot 8 described as follows: Beginning at a point 33 ft. north of the corner of Secs. 27, 28, 33 and 34 on the section line between Secs. 27 and 28,thence running north on section line between Secs. 27 and 28 a distance of 843 ft., thence east on 4° 246 ft. to place of beginning, hence east on 4° 246 ft., thence south 100 ft., thence west 246 ft., thence north to place of beginning.

The above described parcels containing 246.23 acres more or less. Subject to all valid easements, rights-of-way,

reservations of oil, gas and minerals, and other rights of record.

Kenneth Smith.

Assistant Secretary–Indian Affairs.

[FR Doc. 82-10958 Filed 4-21-82; 8:45 am]
BILLING CODE 4310-02-M

FEB 10 1995

BY TELEFAX AND FIRST CLASS MAIL C-29A

Arlyn Ackley, Sr.
Tribal Chairman
Sokaogon Chippewa Community
Mole Lake Band
Rt. 1, Box 625
Crandon, Wisconsin 54520-9635

Re: Status of Treatment as State Application

Dear Mr. Ackley:

This letter responds to your inquiries to Valdas Adamkus dated January 27 and February 7 concerning the status of your Tribe's application for "treatment as a State" ("TAS") for the water quality standards program under Section 303 of the Clean Water Act. As you know, the State of Wisconsin raised a competing claim of jurisdiction regarding waters within the Mole Lake reservation. The Office of Regional Counsel ("ORC") is working closely with the Office of General Counsel ("OGC") at the United States Environmental Protection Agency ("EPA") Headquarters to resolve this claim so that EPA may make a decision on your application as soon as possible.

The Mole Lake Band submitted its Section 303 TAS application to EPA on August 13, 1994. The application did not provide enough information regarding the specific lands and water resources over which the Tribe would exercise its authority. After the Tribe provided that information to EPA, EPA provided the State of Wisconsin 30 days, beginning on October 5, 1994, to submit comments on the Tribe's assertion of authority, as required by 40 C.F.R. § 131.8(a) (3). On November 4, 1994, the Wisconsin Department of Natural Resources ("WDNR") indicated that it believed that there

may be a significant jurisdictional claim on behalf of the State that may inhibit application of TAS status to Indian Tribes in Wisconsin. WDNR requested an additional 90 days to complete its comments. On November 18, 1994, EPA notified the Tribe and WDNR that EPA would accept comments from both parties until December 5, 1994. Both WDNR and the Tribe sent EPA additional comments on December 5.

EPA considers some issues raised by WDNR (i.e., ownership of water beds within the reservation and the effect of that ownership on the right to regulate water quality) to be nationally significant. In fact, at least one other State in another EPA Region has raised similar issues. EPA policy requires ORC to refer nationally significant Indian law issues to requires ORC to refer nationally significant Indian law issues to OGC for resolution. Pursuant to that policy, ORC has forwarded to OGC all documents relevant to the competing claim.

Another issue of national significance which ORC has referred to OGC for resolution is the extent of the appropriate consultation with the Department of Interior. Until December 14, 1994, EPA regulations required EPA to consult with the Department of the Interior on any competing claim raised by a State to a Tribe's assertion of authority. On that day, EPA issued regulations which remove that requirement. *See* 59 Fed. Reg. 64,344. As explained in the preamble to the December 14 rule, EPA still may, at its discretion, consult as it sees fit with the Department of Interior or any other Federal agency.

ORC and OGC are working closely together and consulting with other affected Regional offices to resolve all issues affecting the Tribe's application as expeditiously as possible. We are aware of the importance of Section 303 TAS to your Tribe and appreciate your understanding of the complexity of the situation. EPA shall keep the Tribe informed of our progress in this matter. If you have any additional questions,

please feel free to telephone me at 312/886-6675 or Marc Radell of my staff at 312/886-7848.

Sincerely,

Gail C. Ginsberg
Regional Counsel

cc: Howard Corcoran, OGC

bcc: ORA (w/control slip)
O'Riordan, R-19J
C. Johnson-Schultz, W-15J
D. Pfeifer, WQ-16J
K. Ambutas, ME-19J
S. Dodge, IEL
J. Havard, OGC, 2378
C. Klebenow, C-29A

U.S. Department of Justice

Environment and Natural Resources Division

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Mr. Gino Agnello
Clerk
United States Court of Appeals for the 7th Circuit
219 South Dearborn St.
Chicago, IL 60604

June 1, 2001

Re: Wisconsin v. Environmental Protection Agency
7th Cir. No. 99-2618. **Oral Argument held 11/6/2000**

Dear Mr. Agnello,

An original and four copies of this letter are submitted pursuant to Federal of Appellate Procedure 28(j). This letter is intended to bring to the Court's attention the latest decision by the Supreme Court applying the so-called Montana exceptions to the general proposition that the inherent sovereign powers of Indian tribes do not extend to nonmember activities on non-Indian fee land within a reservation. See Montana v. United States, 450 U.S. 544, 565 (1981). On May 29, 2001, the United States Supreme Court decided Atkinson Trading Company v. Shirley, 2001 WL 567730 (a copy is attached). This case concerns a hotel operated within the Navajo Nation Reservation but located on non-Indian fee land. The Navajo Nation imposed a hotel occupancy tax on the hotel guests. The hotel owner challenged the tax, alleging that the Navajo Nation lacked the authority to tax guests staying on non-Indian fee lands. The Tenth Circuit Court of Appeals upheld the tax, finding that it

fell within the so-called first Montana exception because a consensual relationship exists in that the nonmember guests could refrain from lodging within the Navajo Reservation and therefore remain free from the tax. The Supreme Court reversed.

The Court found that the first Montana exception did not apply because a consensual relationship must stem from commercial dealings, contracts, leases or other arrangements and a hotel guest's actual or potential reliance on tribal emergency services (like tribal police, fire or medical departments) fails to create the requisite connection. (Opinion at 4). The Court also found no basis to apply the second Montana exception, which permits tribal regulation of non-Indian fee land when conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 566. The Court concluded that operation of the hotel had no such effect on the Navajo Nation. (Opinion at 5).

Although the facts of Atkinson Trading differ from the instant case, we bring it to this Court's attention because it is the Supreme Court's most recent discussion of the Montana test, which the Court applied "straight up"(see opinion at 4) in Atkinson Trading. The brief of the United States discusses how the second Montana exception applies to the instant case at pp. 31-44. The brief explains that Montana is arguably irrelevant in this case because there are no non-Indian lands within the Reservation owned in fee by nonmembers (only submerged lands arguably owned by Wisconsin). Br. 31. Nonetheless, the brief shows that if the second Montana exception applies here it is satisfied because, under the facts of this case, impairment of water quality by nonmember activities may have serious and substantial impacts on the Mole Lake Band and water quality management is critical to tribal self-government. See Br. 39. As indicated by the attached service list a copy of this letter has been provided to opposing counsel.

Respectfully submitted,

/s/
Andrew C. Mergen
Attorney, Appellate Section
Environment & Natural
Resources Div.
U.S. Department of Justice
(202) 514-2813

120a

19 20 21 22 23 24

SOKAOGON

(MOLE LAKE)

CHIPPEWA

COMMUNITY

Creek

Swamp

30 28 27 26 25

Mole Lake

31 32 33 34 35 36

Squaw

FOREST

LANGLADE

COUNTY

COUNTY

To Pickerel

R. 12 E.

LEGEND

UNIMPROVED

GRADE AND DRAIN

GRAVEL

LIGHT BITUMINOUS

HEAVY PAVING

U.S. HIGHWAY MARKER

INTER STATE HIGHWAY MARKER

STATE HIGHWAY MARKER

BUREAU OF INDIAN AFFAIRS HIGHWAY MARKER

INDIAN RESERVATION BOUNDARY

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SOKAOGON CHIPPEWA (MOLE LAKE) COMMUNITY

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